

# **Pushing Envelopes: Let Me Count the Ways**

**Notes for an Address**

**by**

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Chairperson, Deputy Chairperson and other members of the BCCSA, foreign dignitaries, ladies and gentlemen. It is a pleasure to be back in Johannesburg nine years after the first such conference and to have the chance to exchange experiences in the area of broadcast content issues with colleagues dealing with broadcast content issues from around the world. With such a knowledgeable and experienced group of experts, it will indeed be intriguing to see how many of us encounter similar kinds of envelope-pushing in our respective countries. What may also be mutually educational will be the extent to which we are limited in dealing with these issues by juridical definitions of free speech.

## **The Canadian Players**

First, an introduction to the Canadian players in the area. There are the regulator and the self-regulator. The regulator is the Canadian Radio-television and Telecommunications Commission (the CRTC), which has plenary authority in all broadcasting and telecommunications issues; its authority is derived from Parliament. It is statutorily created and funded by the Government of Canada. In the area of its activity that interests us here today, the CRTC administers the *Broadcasting Act* and creates the regulations under that Act that apply specifically to the various sectors, such as radio, television, the specialty services and pay television.

The self-regulator is the Canadian Broadcast Standards Council. It deals only with the content area of broadcasting. Its authority and funding emanate from Canada's private broadcasters, who created the CBSC to administer the codes they created relating to ethics, gender portrayal, television violence and journalistic ethics. The CBSC has a close relationship with the CRTC and, by agreement, the Commission

forwards all of the complaints it receives concerning the CBSC's broadcaster members to the Council for treatment and, where necessary, adjudication. Basically, the CRTC is glad to pass along the extra work it would otherwise have to support if the CBSC did not exist.

The CBSC began dealing with complaints about programming on Canada's private broadcasters back in 1991 and, in our first few years, we annually opened about 200-250 files and rendered about 10 decisions. We now respond to about 2,500 complaints and produce in excess of 100 decisions annually. The public have found their voice.

## **The Canadian Charter of Rights and Freedoms**

This division of complaint-resolution responsibility has the effect that the 1982 constitutional document known as the *Canadian Charter of Rights and Freedoms*, about which I will say more in a moment, and which guarantees freedom of expression, applies to the CRTC but not to the CBSC. It follows that the legal challenges that may occasionally be raised to CRTC decisions ("matters within the authority of Parliament") (and which may be seen as limiting broadcasters' freedom of expression) have not hitherto been raised against the CBSC. This is of course a material issue since it is undeniable that the broadcaster codes and, as one would expect, the CBSC's decisions, necessarily have the effect of limiting freedom of expression in Canada.

## **The North American Continent**

Canada is situated on a 5,000-km border with the most culturally-dominant country in the world. American films and television easily cross our border and yet, in this area, our regulatory lives are immensely different. Culturally speaking, our values reflect our differences. And constitutionally speaking, our methods of responding to problematic programming also differ significantly.

On the cultural side, the Americans are more fundamentalist, on the one hand, and more accepting of violent content, on the other. Seeing a naked person is more of a problem than shooting one on television. Coarse language is a no-no although insulting language is just fine. Ranting on talk radio (what many of you call talkback radio) about immigrants on the basis of their nationality or about any individuals on the basis of their sexual orientation generally passes muster. Obscenity over ethnicity. It is undeniable that some of the same issues concern some Canadians but they tend to trouble *fewer* Canadians and the CBSC deals with them differently.

One of the overriding differences between Canada and the U.S. is on the constitutional level, which naturally underlies all content resolution. We are all familiar with the American First Amendment. It provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." Canada's right to freedom of expression, by contrast, is not stated as an absolute; rather, the *Canadian Charter of Rights and Freedoms* provides that "freedom of opinion and expression, including freedom of the press and other media of communication" is subject "to such reasonable

limits ... as can be demonstrably justified in a free and democratic society.” Deputy Chief Justice Moseneke has pointed out to us that just such a limitation exists here in South Africa as well.

In Canada we tend to accept the idea that freedom of expression, a cherished value, is *one* value, but not the *only* value, and that it, in broadcasting, it should be weighed against other values in society.

The right to speak freely does not, for example, supersede the right of society to be free from hate speech, which is a *criminal* offence in Canada.

The right to speak freely does not, in the view of the CBSC, supersede the right of identifiable groups to be free from abusive or unduly discriminatory comment on the basis of, among other things, their race, their religion, the colour of their skin, their mental or physical disability, their gender or their sexual orientation.

The right to speak freely does not supersede the right of our children to be free from television programming containing violent or other material intended for the viewing of adults. You may also find it interesting to learn that, in the Province of Quebec, *no* advertising may be directed at children in television or any other electronic or print medium.

So, while it is clear that freedom of speech is a *precious* right, it does not mean that Canadian audiences should be subject to absolutely *any* form of speech. Because the Canadian system does not permit excessive violence during children’s programming, because it does not allow hateful comments on the basis of people’s religion or the colour of their skin, because it does not allow imbalance in the portrayal of men and women does not mean that our free speech is unduly restrained or that the Canadian social fabric is weakened.

In short, in Canada we *respect* freedom of speech but we do not *worship* it.

## **The American Solution**

Those of us who have been following such matters have, on the procedural side, seen a streak of conservatism on media issues in the United States, broadly speaking, and in the American Congress, in particular. The House of Representatives has passed a bill increasing fines for indecency offences from \$27,500 per incident to \$500,000. In Canada, neither the CBSC nor the CRTC have the power to fine broadcasters but, as I will tell you, our process on content issues seems to be more effective, at least in bringing about results on matters of concern to Canadians. We have our own values, our own standards, our own subtle but effective ways of ensuring compliance. Our process differs radically from the more heavy-artillery American approach.

Canada has been able to create a self-regulatory approach. Such a solution does not exist in the United States and I expect that it might be challenged on the basis of the First Amendment.

## **Diversity and Multiculturalism in Canada**

You may also be interested to learn that Canada is not a melting pot. We are the sum of our parts, of our origins. 19% of us were born outside Canada and almost as many, 1 of every 6, of us has a mother tongue other than English or French. We have more than 200 ethnic origins and collectively speak more than 100 languages. In the English-speaking and French-speaking hubs of Vancouver and Montreal, more than 30% of the populations are visible minorities and in Toronto, perhaps the most cosmopolitan city in the world, that figure rises to 50%. And the CBSC is doing its best to reflect all of this. We produce all of the essential information about the Council and the self-regulatory system established by Canada's private broadcasters, as well as all the regularly-used provisions of our four broadcast codes - the *Code of Ethics*, the *Sex-Role Portrayal Code*, the *Violence Code* and the *Code of (Journalistic) Ethics* - in 32 languages, and I have brought copies of each of these brochures with me to this Conference, as an example of the CBSC's ethnocultural outreach program. I should add that all of the information provided in these, supplemented by additional text, is available on our web site in all of these languages. We are also in the process of producing translations into an additional 8 languages at this very moment.

## **Pinpointing the Issues: Introduction**

The theme of this session is "Pinpointing the Issues". Accordingly, I will focus on what the CBSC understands has been bothering Canadians over the last year or two in particular and will try in the short space of time allotted to give you a sense of what the Council's solutions have been. I fear that this presentation will be a bit in the nature of a catalogue but I expect that this is the most useful way to proceed. I will naturally be curious to know if these areas have been as predominant in your experience. (Incidentally, I have brought a limited number of copies of the Council's *Annual Report* for the past year and will put these out, together with a document describing our cultural outreach program as well as the copies of our brochure just mentioned.)

## **Sexual Content**

The first, and growing, area is sexually explicit content, primarily, although not solely, in the television area. These complaints basically fall into two genres, on their face of very different natures, but underlying each is a commonality of subject matter. They both touch on the verboten. They are a form of hidden fruit. As we have learned from our complainants, the accessibility of sex, and even nudity without the component of sexual explicitness, tends to evoke strong reaction on the part of the more traditional and conservative elements of Canadian society.

On the television side, the first genre is the dramatic film or television series. It seems like yesterday that the informal codification of rules did not even permit married couples to be seen in bed together, without so much as a hint of nudity. Today, suggestiveness abounds in prime time television, as well as afternoon soaps and the

discussion of themes, such as pre-marital sexual activity and more, is not at all hidden from audiences. Our complaints occasionally touch on such relatively innocent sexual innuendo but it is nudity and unsubtle sexual activity that give rise to the complaints.

The second genre of sexual programming generating a considerable number of complaints involves documentaries and informational programs that treat sexual subjects and feature frequent explicit depictions of nudity and sexual activity. Examples are “Kink”, “Real Sex”, “Sex TV”, “Sex Shop”, “Sexual Century” and so on (you get the picture). These didactic or informative programs have ventured into areas such as anal sex, bestiality, strip tease dancing, the use of sex toys, the telephone sex business, and the pornography industry, among others. Even a respected newsmagazine program, Canada’s venerable *W-Five*, has presented a fairly explicit segment on the practice of swinging.

How, then, does the CBSC deal with questions of sexual content on television? Let me begin by saying, first, very differently than the United States, and, second, with considerable flexibility.

The CBSC deals with sexual content by the use of several “tools” established by the private broadcasters: the Watershed hour, viewer advisories, on-screen ratings icons, and encoded V-chip information.

If the challenged program is, in the view of the Council, exclusively intended for adult audiences, it cannot play outside of the Watershed hours, which extend from 9:00 pm to 6:00 am. (Parenthetically, this solution is more complicated in a country with 6 time zones but that is a more complex issue in the Canadian context and a matter for another moment.) When the Watershed came into effect on January 1, 1994, it channelled only violent adult fare into the post-9:00 pm time slot. Over the years, though, via its jurisprudence, the CBSC extended the Watershed requirements to *all* forms of adult programming and the *Code of Ethics* has been revised to reflect these principles.

Notwithstanding the Watershed, it has been the position of the CBSC that nudity alone does not constitute adult fare. We have long accepted bare breasts in the context of “Fashion Television”, news stories and even the motion picture *Strip Tease* as tolerable prior to 9:00 pm. When the admittedly inappropriate saga of the split-second revelation of Janet Jackson’s right breast in the course of the half-time show during the afternoon broadcast of the American Super Bowl two years ago generated 540,000 complaints to the Federal Communications Commission, less than 200 Canadians complained and the CBSC did not even deal with the matter via its public formal adjudication process. And in the United States, a problem that would be laughable in the most of the rest of the world, earned a \$550,000 fine for CBS Television and its affiliates.

Where, however, nudity is combined with sexual activity, it is the view of the Council that this constitutes sufficiently erotic content to be interpreted as intended exclusively for adult audiences. Although it has been a unique occurrence in the experience of the CBSC, intense eroticism without nudity may also fall into the category of exclusively adult content.

The CBSC does not, however, view such programming as problematic provided it is broadcast after the “Watershed” hour of 9:00 pm and carries viewer advisories and on-screen icons, as well as the V-chip encoding not visible to the naked eye. It is, however, the rule in Canada that on-screen icons are not required in the case of news, documentary or public affairs programming and some of the complaining, as noted a moment ago, has been with respect to such shows.

Before ending the discussion of sexual content, I should add that we, in fact, also have such problems in the area of radio, particularly during “morning drive” radio. Clearly, some radio stations have found that they can attract audience with jokes or stories with a sexual component, while their audience is driving to the office. In any event, the CBSC takes no issue with discussion involving sexual innuendo on morning radio but it has found code breaches for more explicit discussion at times of the day when children could be listening. How do we distinguish? It’s a little bit along the lines of American Supreme Court Justice Potter Stewart, who, when asked to define obscenity, said that he could not but that he knew it when he saw it.

### **A Digression: Bubba the Love Sponge and Howard Stern**

Let me digress for a moment to recount some of the sagas of indecency in the United States and Canada. About a year ago, the American regulator proposed fines of \$755,000 against radio giant Clear Channel for the sexually explicit dialogue of Ted Clem, aka Bubba the Love Sponge.

Perhaps in order to escape that liability and avoid fresh fines, Clear Channel first fired Clem and, then, two days later, dumped New York shock jock Howard Stern, with the expressed intention of “protecting [their] listeners from indecent content. ... [The Stern Show] was vulgar, offensive, and insulting, not just to women and African Americans but to anyone with a sense of common decency.” The reality is that, as Stern himself said, he was only doing what he had been doing for 20 years. One wonders where the FCC and the American broadcasters had been since his WXRK debut in 1985.

The Stern story resonated with Canadians, who had experienced the New York shock jock’s arrival in Toronto and Montreal in September 1997. While Stern’s style was then new and shocking to Canadians, Canada’s self-regulatory process solved the problem quite quickly.

Following Stern’s Canadian debut, the CBSC received complaints from over 1,000 individuals who complained of: first, his characterization of French-speaking Canadians as “peckerheads” and “pussy-assed jack-offs”; second, other derogatory comments on the basis of gender, ethnicity and national origin; and third his explicit description of a failed holiday with his wife because of her failure to remember to bring two sex toys with her on their trip. Two months later, the CBSC found that each Stern episode “contained abusive or discriminatory comments directed at French-Canadians and other identifiable groups, made sexist remarks or observations, or contained unsuitable language or descriptions of sexual activity during a broadcast period when

children could be expected to be listening to radio." Unlike its American counterpart, the CRTC did not get involved in this matter.

In keeping with the CBSC's decision regarding this multi-million dollar investment in the Stern Show by the Canadian licensees, the broadcasters themselves decided to import digital time shift recording equipment from the US. With it, they edited the show and forwarded daily edit logs to the CBSC. In this new, Canadian-edited format, the show lasted 11 months in Montreal and 3-4 years in Toronto. It's long gone from Canadian airwaves without the need for any Government regulatory involvement.

## **Violent Content**

Violent content is slightly different in the sense that gratuitous violence and glamorized violence are not permitted on television at any time of the day or night. That being said, it is rare that complaints even arise with respect to such violence on conventional television or the specialty services. Consequently, in dealing with violence that plays a legitimate part in the development of plot or character, the biggest responsibility for the CBSC is to determine whether the violent matter is intended exclusively for adult audiences. There is no mathematical formula applicable to such evaluations but, the more graphic the images, the likelier the program will be to fall into the adult category. The other formula we have applied, and will again in a decision to be released next week is that the presence of the combined elements of fear, suspense, gore and explicitness may help characterize programming containing scenes of violence as *adult*.

This principle applies to both fictional programs, such as crime dramas, as well as non-fictional or informational programs that deal with violent events. Strangely, we have had very few complaints regarding what are commonly known as "reality shows". One recent exception was an episode of the *Maury Povich Show* entitled "Shocking Life or Death Moments Caught on Tape", which may tell you everything you need to know about the nature of its content, may I add, *repetitive* content. Nothing didactic or useful about that episode. Just an opportunity to exploit video segments of a shocking nature. The CBSC has also received complaints about programs that depict what could be termed "dangerous" behaviour (rather than actual violence), such as outrageous physical stunts or drug use.

It is interesting that violence is another area in which Canada appears to be more liberal or permissive than the United States in *certain limited* circumstances. The classic example may be the well known organized crime series, *The Sopranos*. While it can only be broadcast in the USA on pay television, in Canada the CBSC has found it suitable for broadcast during the post-Watershed period, once again provided viewers are provided with sufficient information to enable them to make informed viewing choices.

## **Coarse Language**

In addition to sexual content and violence, coarse language is also another common area of concern for audiences of both television and radio programming. In the television context, the CBSC has determined that what we euphemistically refer to as the f-word (and the manifold variations thereof) must not be aired before the Watershed hour.

While there is no similar definitive hour for “adult” programming in the radio context, the CBSC has stated that the f-word should not be broadcast during daytime hours, whether in the context of talk radio or songs. I do not know what the practice is on the European-African side of the Atlantic or in Australasia but, in North America, most record companies produce alternative, edited versions of songs with potentially coarse or offensive language, since there are many stations that will not, of their own volition, play the versions that can be purchased in record shops. In any event, the versions with the f-word and derivatives are, in Canada, unacceptable for play on private radio at hours of the day when children could reasonably be expected to be listening. Most of the other “four-letter words” have been deemed acceptable at any time of day, though context is relevant. Since the CBSC deals with complaints for both English- and French-language broadcasters, it has also dealt with complaints about French, as well as English, swear words, and it is able to deal with comparable issues in any of the other languages of broadcast in Canada.

## **Discriminatory Comment**

Discriminatory comments against groups on the basis of nationality, ethnicity, religion and sexual orientation also remain common areas of concern. Over the past year, the CBSC has witnessed an increase in the number of complaints alleging discriminatory comments against homosexuals. This is due to the broader political debate surrounding same-sex marriage which is occurring in North America. Once again there is a large difference between the acceptability of gay marriage in Canada and in the United States. As a result, many talk shows and religious programs in both countries have quite reasonably raised same-sex marriage as an issue for discussion. Fair enough. The difference appears to be that the conservative American talk show hosts and the televangelists are prepared to pull out the most extreme forms of language to describe gays and lesbians - with impunity and without consequence in the United States. Thus, recently, a man of the cloth said on television

This utter, absolute, asinine, idiotic stupidity ... of men marrying men [sounds of agreement from audience]. I've never seen a man in my life I wanted to marry [the televangelist preacher laughs; audience applauds]. And I'm gonna be blunt and plain; if one ever looks at me like that, I'm gonna kill him and tell God he died.

Another host consistently characterized the sexual behaviour of gays and lesbians as “abnormal”, “aberrant”, “deviant”, “disordered”, “dysfunctional”, “an error” or the like. In yet another recent broadcast, a television evangelist referred to homosexuals as “devils”

and “demon possessed”. Although everyone is of course free to discuss and disagree with Government policy on same-sex marriage, on Canadian airwaves, broadcasters are not free to make unduly discriminatory comments about the individuals themselves. And since most of the evangelical preacher broadcasts are imported from the United States, Canadian broadcasters have a heavier burden of vetting the material to ensure that it meets Canadian standards.

The CBSC also continues to receive a few complaints about representation of Arabs and Muslims, which appears to remain a sensitive issue since the September 11, 2001 attacks on the U.S. World Trade Centre. It also receives complaints about discrimination against other groups on the basis of ethnicity and religion. The CBSC has made particularly strong efforts to be pro-active in this area by, among other things, launching the multi-ethnic brochure and web site mentioned earlier. The CBSC’s language outreach initiative reflects our belief that we have a very successful process for dealing with public complaints about broadcasting, which works best when more people know about it. Because the CRTC has now also made the issue of diversity a major concern, I expect that we will also be given additional code provisions to ensure positive portrayal as an adjunct to our ethnocultural outreach.

## **Other Issues**

There are of course other issues we encounter with frequency, including news and public affairs problems. Time does not, however, permit any discussion of these at this moment.

## **Why Self-Regulation Works**

In speaking to John Sneyd of New Zealand and Prash Naik of Britain’s Channel 4 of some of the current legal tussles they are waging in their court systems and in thinking of the challenge our own CRTC is engaged in at this very moment in the Federal Court of Appeal in Canada as the result of the revocation of a radio station’s licence to broadcast, the reason for the success of a self-regulatory process such as ours came clear.

Fundamentally, when broadcasters can agree on a system of codified rules or standards, those rules become *theirs*. They are not imposed from on high; they are theirs. They apply to each of them equally. They level the playing field. They secure no advantage for any one of them. If they all buy into the system, they know that that system will be the stronger for that unity of purpose. They also know that decisions that may not work in their favour on a particular occasion will be balanced by others that will on another. They are also strongly conscious that the failure to effectively regulate themselves today may entice others, for political or other reasons, to do so in the future.

It is also true that, for the system to motivate this form of periodic self-flagellation, there must be a confidence in the fairness, balance and credibility of the decisions and the decision-makers. Once that is assured, all will be well. In Canada, the community of nearly 600 private broadcasters do buy into the process and do adhere to the rulings

of the CBSC, despite the absence of fines or other pecuniary impositions. We have been able to achieve more effective and long-lasting results for the conservation of Canadian values by the mere imposition of broadcaster announcements following a finding of code breach than the FCC has by the imposition of fines of half or three-quarters of a million dollars.

I hope that this brief look at the Canadian corner of the self-regulatory global village has been of interest. Thank you for inviting me to Johannesburg to tell you about it.